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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff,

vs.

Donald Day Jr.,
Defendant.

CR-23-08132-PCT-JJT

**GOVERNMENT'S MOTION IN LIMINE
RE: DNA TESTIMONY AND NOTICE OF
INTENT TO RELY ON FED. R. EVID. 703**

The United States of America hereby gives notice of its intent to rely on Federal Rule of Evidence 703 related to expert witnesses, as necessary to develop the testimony of its expert witnesses. The government further seeks a pre-trial ruling regarding this issue. The below pleading is primarily directed at the introduction of DNA evidence in this case, but also provides legal support for the admission of any expert witness testimony and the underlying data upon which such testimony is based.

The government will be presenting DNA evidence in this case regarding numerous pieces of evidence which contain Defendant's DNA, all as detailed in its "Notice of Intent to Use Expert Testimony Re: DNA." (Doc. 126). The United States intends to call the Border Patrol Agent who swabbed the items for DNA collection and Forensic Examiner Marcy Plaza, who performed the analysis and rendered expert opinions and conclusions.

1 The United States does not intend to call biologists from the FBI's DNA Casework
2 Unit ("DCU"), Katherine Mayer, Margaret Curran, Patricia Kramer, Melissa Ramirez,
3 Emma Stockham, Eugenia Pontacq, Lily Wong, and Emily Carver who were supervised by
4 Ms. Plaza and who processed the evidence in accordance with her instructions. Ms. Plaza
5 is the witness who formed conclusions regarding the DNA in this case, signed the reports
6 containing her conclusions, and will be available for cross-examination.

7 The government moves the Court to find that Ms. Plaza's testimony will satisfy the
8 foundational requirements for the introduction of her expert opinions, which will be in part
9 based on the steps undertaken by other biologists. This request is supported by Fed. R.
10 Evid. 703, and will not deny defendant his rights pursuant to the Sixth Amendment's
11 Confrontation Clause.

12 **I. Background Regarding DNA Analysis**

13 In the DCU, Forensic Examiners and biologists each play a role in the DNA analysis
14 of evidence. When evidence is received, Forensic Examiners determine which items will be
15 tested, which examinations will be performed, and the appropriate workflow for such
16 examinations. A team of biologists processes the evidence in accordance with the directions
17 of the Forensic Examiner and the Standard Operating Protocols of such tests. Biologists
18 keep detailed notes and work closely with the Forensic Examiner as items are processed.
19 When testing is completed, the Forensic Examiner is responsible for data analysis,
20 interpretation, and authoring a report detailing her conclusions.

21 The various steps involved in this process have been detailed in Ms. Plaza's expert
22 witness notice. (Doc. 126). In summary, Ms. Plaza supervises her team of biologists
23 regarding the steps to be employed and the results observed. Much of this process involves
24 biologists transferring samples to robots to perform the various steps.

25 As it pertains to this case, the steps employed by Ms. Plaza and her team have all
26 been detailed in previously provided discovery. Once the preliminary steps of DNA analysis
27 were completed, Ms. Plaza imported the raw data produced to a software program that
28 assists with visualizing the DNA profiles and performing her analysis. She reviewed the

1 laboratory notes and data created by each of the biologists and confirmed that all procedures
2 had been completed appropriately, in accordance with her directions and the Standard
3 Operating Procedures. Additionally, Ms. Plaza analyzed all resulting data and confirmed
4 that controls run alongside the evidence produced the expected results.

5 **II. Argument**

6 While preparing for trial, the government sought stipulations regarding DNA from
7 the defense in order to streamline this case. To date, no stipulations have been reached,
8 including the request outlined here.

9 The government anticipates that DNA testimony will proceed in this fashion:
10 Ms. Plaza will be asked to explain the various steps involved in the DNA process; whether
11 she instructed and supervised a team of biologists to assist in these steps; and whether the
12 steps and analysis yielded results for her ultimate analysis and conclusions. Ms. Plaza will
13 testify that all of this information was captured in data, previously disclosed, and that she
14 based her opinions on such facts and data of which she has been made aware and/or
15 personally observed. She will also testify that experts in her field reasonably rely on those
16 kinds of facts or data informing an opinion on the subject.

17 Rule 703 states: “An expert may base an opinion on facts or data in the case that the
18 expert has been made aware of or personally observed. If experts in the particular field
19 would reasonably rely on those kinds of facts or data in forming an opinion on the subject,
20 they need not be admissible for the opinion to be admitted. But if the facts or data would
21 otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only
22 if their probative value in helping the jury evaluate the opinion substantially outweighs their
23 prejudicial effect.” In the case at bar, the testimony of biologists supervised by Ms. Plaza
24 falls squarely within this rule.

25 Further, Ms. Plaza’s testimony will not in any way violate defendant’s rights under
26 the Sixth Amendment’s Confrontation Clause. “The Sixth Amendment’s Confrontation
27 Clause provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be
28 confronted with the witnesses against him.’” *Crawford v. Washington*, 541 U.S. 36, 42

1 (2004). The Sixth Amendment “guarantees a defendant the right to cross-examine the
2 witnesses against him or her, and it is ‘the principal means by which the believability of a
3 witness and the truth of his testimony are tested.’” *United States v. Wilson*, 605 F.3d 985,
4 1003 (D.C. Cir. 2010) (citation omitted). Statements are “testimonial” when their “primary
5 purpose . . . is to establish or prove past events potentially relevant to later criminal
6 prosecution.” *Ohio v. Clark*, 576 U.S. 237, 244 (2015) (quoting *Davis v. Washington*, 547
7 U.S. 813, 822).

8 “[W]hen a court must determine whether the Confrontation Clause bars the admission
9 of a statement at trial, it should determine the ‘primary purpose of the [statement]’ by
10 objectively evaluating the statements and actions of the parties to the encounter, in light of
11 the circumstances in which the [statement] occurs.” *Michigan v. Bryant*, 562 U.S. 344, 370
12 (2011).

13 The out-of-court statements of expert witnesses are subject to the Confrontation
14 Clause. For example, an affidavit of a state laboratory analyst, swearing that the analyst
15 chemically tested a particular substance and found it to contain a prohibited narcotic,
16 constitutes a testimonial statement such that the affidavit could not be admitted into
17 evidence absent an opportunity for the criminal defendant to cross-examine the analyst. *See*
18 *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009). Such affidavits constitute
19 testimonial statements because they “are incontrovertibly a ‘solemn declaration or
20 affirmation made for the purpose of establishing or proving some fact,’” and because “the
21 affidavits [were] ‘made under circumstances which would lead an objective witness
22 reasonably to believe that the statement would be available for use at a later trial’” *Id.*
23 (quoting *Crawford*, 541 U.S. at 51-52). The Supreme Court subsequently held that a signed
24 statement attesting to an analysis of the blood alcohol content of a defendant’s blood sample
25 likewise qualifies as a testimonial statement to which the Confrontation Clause applies. *See*
26 *Bullcoming v. New Mexico*, 564 U.S. 647, 663-65 (2011).

27 This case does not implicate the Confrontation concerns raised in *Melendez-Diaz* or
28 *Bullcoming* because the government will call the witness who formed the conclusions in this

1 case and signed the reports at issue: Ms. Plaza. The United States Supreme Court and the
2 Circuit Courts of Appeal have been careful “not [to] hold, and it is not the case, that
3 anyone whose testimony may be relevant in establishing the chain of custody, authenticity
4 of the sample, or accuracy of the testing device, must appear in person as part of the
5 prosecution’s case.” *Melendez- Diaz*, 557 U.S. at 311 n.1. In other words, “this does not
6 mean that everyone who laid hands on the evidence must be called.” *Id.* In cases involving
7 DNA examinations specifically, the Supreme Court has noted that “[i]f DNA profiles could
8 not be introduced without calling the technicians who participated in the preparation of the
9 profile, economic pressures would encourage prosecutors to forgo DNA testing and rely
10 instead on older forms of evidence, such as eyewitness identification, that are less reliable.”
11 *Williams v. Illinois*, 567 U.S. 50, 58 (2012).

12 Many Federal Circuit Courts have now ruled that the Confrontation Clause does not
13 require personnel who simply process evidence, such as the biologists in this case, to testify.
14 One such case, *United States v. Murray*, 540 Fed. App’x 918 (11th Cir. 2013), is directly on
15 point. There, the defense challenged the testimony of an FBI DNA examiner from the same
16 FBI DNA Casework Unit as Ms. Plaza. The defense argued the forensic examiner’s
17 testimony violated the Confrontation Clause, as her testimony relied on test results produced
18 by biologists under her supervision. The Eleventh Circuit held that this was not a
19 Confrontation Clause violation. *Id.* at 921. *See also United States v. Kaszuba*, 823 Fed.
20 App’x 77 (3d Cir. 2020) (admission of report through lab director rather than technician who
21 performed the testing did not violate the Confrontation Clause).

22 The United States District Court for the District of Columbia ruled likewise. In
23 *United States v. Perkins*, 83 F. Supp. 3d 326 (D.D.C. 2015), the Petitioner claimed an FBI
24 DNA analyst’s testimony (again from the same FBI DNA Casework Unit as Ms. Plaza)
25 violated the Confrontation Clause because it was premised on the work of the team of
26 biologists who handled the evidence. Citing *Williams*, the court rejected the argument. *Id.*

27 A District Court in the Eastern District of New York recently explained why the
28 Confrontation Clause does not require each lab analyst who may have participated in testing

1 to testify at trial:

2 [N]ot everyone “whose testimony may be relevant in establishing the chain of
3 custody, authenticity of the sample, or accuracy of the testing device, must
4 appear in person as part of the prosecution’s case.” *Melendez-Diaz*, 557 U.S.
5 at 311 n.1. This is especially true with regard to DNA evidence. In a recent
6 federal habeas decision, the Second Circuit characterized clearly established
7 Supreme Court precedent as follows: “[T]he Supreme Court has never held
8 that the Confrontation Clause requires an opportunity to cross examine each
9 lab analyst involved in the process of generating a DNA profile and comparing
10 it with another, nor has it held that uncertified, unsworn notations of the sort
11 at issue here are testimonial.” *Washington v. Griffin*, 876 F.3d 395, 407 (2d
12 Cir. 2017). A plurality of the Supreme Court has noted that “in many labs,
13 numerous technicians work on each DNA profile. When the work of a lab is
14 divided up in such a way, it is likely that the sole purpose of each technician
15 is simply to perform his or her task in accordance with accepted procedures.”
16 *Williams v. Illinois*, 567 U.S. 50, 85 (2012) (plurality opinion) (citations
17 omitted). Given this primary purpose, these analysts’ notes and written
18 materials concerning their preliminary role in the DNA analysis would not
19 constitute testimonial statements to which the Confrontation Clause applied.
20 *See Clark*, 576 U.S. at 244 (applying the primary purpose test); *Bryant*, 562
21 U.S. at 370 (same).

22 *Sanders v. Fischer*, 2021 WL 3373127, at *7 (E.D.N.Y. Aug. 3, 2021).

23 A District Court in the Western District of Washington also recently held that “the
24 Confrontation Clause does not require the Government to produce the three Biologists as
25 witnesses because the Biologists did not make any “testimonial” statements, express or
26 implied, that are subject to the Confrontation Clause. *United States v. Robinson*, No. 2:22-
27 CR-00212-TL, 2023 WL 6066691, at *4 (W.D. Wash. Sept. 18, 2023)
28

1 The Confrontation Clause entitles the defendant to cross-examine Ms. Plaza, the DNA
2 analyst who formed DNA conclusions in this case. Ms. Plaza performed the final-level DNA
3 analysis, reviewed the results of the preliminary evidence processing conducted by
4 colleagues, produced the relevant DNA profiles, and expressed her expert opinions
5 regarding the significance of the DNA in this case. Ms. Plaza's actions amounted to the
6 performance of a DNA test, and the defendant's Confrontation Clause rights will be satisfied
7 as he will have an opportunity to cross-examine Ms. Plaza at trial. *See Fischer*, 2021 WL
8 3373127, at *8; *see also Pitre v. Griffin*, 2016 WL 7442653, at *9 (E.D.N.Y. Dec. 26, 2016)
9 ("Here, petitioner had the opportunity to cross-examine the only expert that expressed an
10 opinion to the jury tying the victim's DNA to petitioner's clothing.... At this point in the
11 development of the law on the right to confrontation over DNA testing, no Supreme Court
12 precedent requires more."); *Rush v. Wright*, 2018 WL 4375150, at *8 (N.D. Ala. 2018)
13 (analyst explained that "she reviewed a summary of all quality control measures within each
14 analysis, as well as the actual data from the specific samples. She then composed the report
15 from which she testified. Her testimony comports with the requirements of the Sixth
16 Amendment.").

17 It is the conclusions in Ms. Plaza's reports that are accusatory, because they link
18 Defendant's DNA to the firearms and ammunition. Unlike *Melendez-Diaz*, where no
19 witness testified about the certificates, here the government will be calling a witness who
20 will testify in detail about her work related to the DNA testing, and the defendant will have
21 the opportunity to cross-examine that witness.

22 Furthermore, the testimony of the DCU biologists who processed the DNA for Ms.
23 Plaza's analysis would not add any particular value to Ms. Plaza's testimony. All steps taken
24 by the biologists were pre-determined by Ms. Plaza and the DCU Standard Operating
25 Procedures. The biologists did not make decisions or form conclusions. Ms. Plaza reviewed
26 their work and confirmed the integrity of the processing done by the biologists, and there is
27 no indication in the case file that there was anything remarkable or irregular about the
28 processing of the evidence in this case. There were no discrepancies in the chain of custody,

1 nor were any tasks performed by the additional DCU biologists outside of the Standard
2 Operating Procedures of the DCU. Calling additional DCU biologists to say just this at trial
3 is a waste of resources and legally unnecessary, as their testimony is not required by the
4 Sixth Amendment.

5 **III. Conclusion**

6 For these reasons, the government respectfully moves the Court to find in advance of
7 trial that the government does not need to call the FBI DCU biologists at trial to satisfy the
8 defendant's general Sixth Amendment rights.

9 Respectfully submitted this 25th day of March, 2025.

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11 TIMOTHY COURCHINE
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13 District of Arizona

14 *s/Abbie Broughton*
15 ABBIE S. BROUGHTON
16 DAVID A. PIMSNER
17 Assistant U.S. Attorneys
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19 **Certificate of Service**

20 I hereby certify that on March 25, 2025, I electronically transmitted the attached
21 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
22 Notice of Electronic Filing to the following CM/ECF registrants:

23 Mark Rumold
24 Jami Johnson
25 Attorney for Defendant

26 *s/Alexandria Gaulin*
27 U.S. Attorney's Office
28